No. 16101

United States Court of Appeals

For the Ninth Circuit

HENRY H. BARRETT,

Appellant,

v.

IOWA NATIONAL MUTUAL INSURANCE COMPANY, a corporation,

Appellee.

Appellant's Brief

Appeal from the United States District Court for the District of Montana.

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I.
JURISDICTION

This case was tried before District Judge W. D. Murray, sitting without a jury, on stipulated facts. The District Judge entered a final judgment in favor of the defendant and against the plaintiff (R. 15). Plaintiff is a citizen and resident of Montana (R. 3); defendant is a foreign mutual insurance corporation organized under the laws of Iowa (R. 3). The amount in controversy exclusive of interest and costs exceeds $3,000.00. The

United States District Court had jurisdiction under Title 28, Section 1332, United States Code,* and this Court has appellate jurisdiction under Title 28, Section 1291, United States Code.

II.

STATEMENT OF THE CASE

The facts in this case are not in dispute. On November 30, 1953, the plaintiff was the owner of a building located at 15 North 32nd Street, Billings, Montana, and he leased separate portions of said building to seven separate tenants (R. 8). On that date a policy of insurance written by the defendant was issued to plaintiff, the original of which has been submitted to this court pursuant to stipulation of counsel. The policy period was from November 30, 1953, to November 30, 1954.

So far as this case is concerned, the material part of this policy is "Coverage C" of Item 3 on the first page of the policy. For convenience, that portion of the policy is as follows:

	"COVERAGES	LIMITS OF LIABILITY
		$ 1,000.00 each accident
	Property Damage	10,000.00 aggregate operations
C	Liability—Except	10,000.00 aggregate protective
	Automobile	Excluded aggregate products
		10,000.00 aggregate contractual"

On May 14, 1954, a fire commenced in the building, starting in a tenant's garage, and thereafter progressing

* This appeal was taken prior to the 1958 Amendment increasing the jurisdictional amount from $3,000.00 to $10,000.00.

from point to point throughout the building, finally becoming extinguished about two hours after the fire started (R. 9). As a consequence, several actions were commenced against the plaintiff by his various tenants to recover for the loss of property in the fire (R. 10). Ultimately, all of these actions were settled for the total sum of $5,000.00, no more than $1,000.00 being paid to any one claimant (R. 11). The defendant, Iowa National Mutual Insurance Company, claimed it was, under its policy, liable only to pay $1,000.00 of this total settlement and the plaintiff must absorb the loss over and above that $1,000.00, to-wit, $4,000.00, and plaintiff paid this loss. The instant action is to recover that sum from defendant.

III.

THE QUESTION PRESENTED

The basic question to be determined in this case is the meaning of the use of the phrase "each accident" in Coverage C, as modified by the phrases "$10,000.00 aggregate protective" and "$10,000.00 aggregate contractual." There is, admittedly, a division of authority on the problem presented by this appeal. The question to be decided has been aptly put by the annotator in a recent annotation in American Law Reports in 55 A.L.R. 2d, p. 1303:

> "In construing the 'per accident' clause, all the courts base their decisions on an application of the same general rules of construction. The different results they reach under these rules are brought about by the fact that some courts consider the clause, and particularly the terms 'accident' and 'occurrence,' as ambiguous, while other courts consider the clause as couched in plain and unambiguous terms.

> "On the basis of the above analysis, one would come to the conclusion that while the courts have reached different results in individual cases, there is no split of authority as far as legal theory is concerned. Such a conclusion, however, while literally correct, overlooks the difference in what may be called the philosophical approach taken by the courts in construing the 'per accident' clause, which approach forms the true reason of their decisions. Underlying all the decisions there is a single basic issue of a philosophical nature, namely, whether the term 'accident' as used in the 'per accident' clause refers to the cause or to the result of the event insured against. Stated differently, the question is whether the 'per accident' clause should be construed as providing for a maximum of liability resulting from one proximate cause or as applying to the result to the injured persons protection against whole claims is the subject of the insurance."

Significantly, none of the cases supporting defendant have considered the impact on the contract of the misleading phrases "aggregate protective" and "aggregate contractual." We submit, *arguendo,* that if the phrase "each accident" is, by itself, free from ambiguity, it is made ambiguous by these modifying phrases. The presence or absence of these phrases may be a sound basis for reconciling the conflicting cases which have considered the problem at bar.

IV.

SPECIFICATIONS OF ERROR

1. The Court erred in its Conclusion of Law numbered II (R. 14).

2. The Court erred in its Conclusion of Law numbered III (R. 15).

3. The Court erred in directing the entry of judgment in favor of the defendant and against the plaintiff.

4. The Court erred in entering the judgment in favor of the defendant and against the plaintiff.

V.

ARGUMENT

A. MONTANA LAW

The rule is settled in Montana that the construction of an insurance contract is governed by the law of the state where the contract is executed. As appears on the face of the policy under consideration, it was executed in Montana. The Supreme Court of Montana has held in *Capital Finance Corporation v. Metropolitan Life Insurance Company,* 243 Pac. 1061, 75 Mont. 460, that an insurance contract made in Montana is governed by Montana law. Likewise, *Section 13-712, Revised Codes of Montana, 1947,* provides as follows:

> "Law of place. A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

In the case at bar the insurance contract under consideration was not only made in Montana, but was to be performed in Montana. There are no Montana cases precisely deciding the question to be decided by this Court in the case at bar. There are, however, cases that point to the conclusion that Montana would construe the "each accident" clause as applying to the result to the injured person rather than the cause.

The rule is settled in Montana that:

1. A contract of insurance must be drawn with such precision that it will be free from ambiguity, require no construction, but construe itself; otherwise all doubts are to be resolved in favor of the insured. *Montana Auto Finance Corp. v. British & Federal Fire Underwriters,* 232 Pac. 198, 72 Mont. 69.

2. A policy of insurance is to be liberally construed in favor of the insured and strictly construed against the insurer. *Dalbey v. Equitable Life Assurance Society of the United States,* 74 Pac. 2d 432, 105 Mont. 587; *Johnson v. Metropolitan Life Insurance Company,* 83 Pac. 2d 922, 107 Mont. 133; *Aleksich v. Mutual Benefit Health & Accident Ass'n.,* 164 Pac. 2d 372, 118 Mont. 223, 162 A.L.R. 263.

3. Where language of a policy is ambiguous and susceptible to two different constructions, it will be strictly construed against the insurer and that construction adopted which is most favorable to the insured. *Park Saddle Horse Company v. Royal Indemnity Company,* 261 Pac. 880, 81 Mont. 99.

The reasons for these rules are cogently stated in *Montana Auto Finance Corporation v. British & Federal Underwriters,* 232 Pac. 198, 72 Mont. 69, at page 75:

"It is a matter of common knowledge that insurance companies prepare their own contracts of insurance. The language of the policy is their language. They do not permit the insured to have a voice in the drawing of his own contract; nor does he negotiate with reference to its terms in the sense that negotiations are carried on before agreements are reached in ordinary contracts. *** Policies of insurance are invariably complex and understood by laymen with difficulty, and as a result the insured generally makes a request for the kind of insurance he desires, then signs 'on the dotted line' upon a formidable appearing printed form with the provisions of which the

average insured has slight, if any, acquaintance. *The policies are prepared by skilled lawyers retained by the insurance companies, who through years of study and practice have become experts upon insurance law, and are fully capable of drawing a contract which will restrict the scope of the liability of the company with such clearness that the policy will be free from ambiguity, require no construction, but construe itself."* (Emphasis supplied)

An average individual, in an over-the-counter purchase of an insurance policy, certainly would not indulge, for example, in the polemics of the author of the annotation in 55 A.L.R. 2d 1303, *supra.* He would not be concerned with the different philosophical approaches of the various courts and speculate whether the "per accident" clause meant "cause" or "effect." He would assume, and rightly so, that he was buying protection up to $10,000.00 "aggregate protective" for multiple claims. Otherwise, the latter phrase is meaningless. This is especially so in situations where the insurance purchased, as here, was to protect plaintiff from possible claims of seven different tenants. If the insurer had a different intent, it should say so "with such clearness that the policy will be free from ambiguity, require no construction, but construe itself." To hold otherwise would ignore Montana cases which require policies upon which the public relies for protection to be written free from fine distinctions which few can understand until pointed out by lawyers or judges. The fact that the word "accident" is ambiguous is pointed out by the New York Court of

Appeals in *Burr v. Commercial Travelers Mutual,* 295 N. Y. 294, 67 N.E. 2d 248, 166 A.L.R. 462:

> "Legal scholars have spent much effort in attempts to evolve a sound theory of causation and to explain the nature of an 'accident.' Philosophers and lexicographers have attempted definition with results which have been productive of immediate criticism. No doubt the average man would find himself at a loss if asked to formulate a written definition of the word. Certainly he would say that the term applied only to an unusual and extraordinary happening; that it must be the result of chance; that the cause must be unanticipated or, if known, the result must be unexpected."

B. AUTHORITIES FROM OTHER JURISDICTIONS

At the time the policy before this Court was written, on November 30, 1953, the only definitive case precisely deciding the question at bar which the skilled lawyers who write these policies had before them to guide them was *Anchor Casualty Co. v. McCaleb,* 178 Fed. 2d 322 (C. A. 5th, 1948). In *Anchor,* the insured formed a mining partnership, by the terms of which certain drilling operations were to be conducted upon lands leased by the insured from third parties. A policy of insurance was issued to them by the Anchor Casualty Company which limited liability caused by "each accident" to "$5,000.00," with "aggregate contractual" liability limited to $25,000.00. While the policy was in full force and effect, an oil well which the insured was drilling blew in and caused considerable quantities of oil, gas, distillate, sand and mud to be carried by the wind onto property of land

owners and tenants in the immediate area, with resulting damage to property. A number of actions were filed by the land owners aggregating $35,000.00 The Anchor Casualty Company brought the action for a declaratory judgment that the total liability of Anchor Casualty Company under the terms of the policy was $5,000.00 because this constituted only one accident within the meaning of the policy. The Court in refusing to say this was one accident held in favor of the defendant, stating (p. 324):

> "Appellant's total liability for property damage under the policy is not measured by the limit of $5000 stated in the policy under coverage 'b' for each accident, but by the limit of $25,000 stated for aggregate damage. The blowing-out of the well was not a single accident but a series of events, a catastrophe. Numerous accidents were the product of this motivating force and the wind a supervening force. The eruptions continued intermittently for over two days; and during this period the wind changed from time to time, blowing mud and sand on different properties. *The wording 'each accident,' as used in the policy, must be construed from the point of view of the person whose property was injured. In Bouvier's Law Dictionary, an accident is defined as an event which, in the circumstances, 'is unusual and unexpected by the person to whom it happens.' When the separate property of each claimant was damaged, an accident occurred to the property of each owner. If one cause operates upon several at one time, it cannot be regarded as a single incident, but the injury to each individual is a separate accident.* Couch, Cyclopedia of Insurance Law, Vol 5, page 4136.
>
> " *** *We think the term 'aggregate' was meant to serve as a total limit of damage to property of different persons from a closely related series of events, such as were evident in this case.*" (Emphasis supplied).

See also: *South Staffordshire Tramways Company, Ltd. v. The Sickness & Accident Assurance Association, Ltd.,* 1 Q.B. 402 (1891), which held in substance that the word "accident" meant the "mischief suffered by a person injured to his person or property."

Denham v. LaSalle, 168 Fed. 2d 576 (C. A. 7th, 1948), which was relied upon by defendant in the District Court, involved the construction of a phrase in a policy of insurance providing: "For any one occurrence or catastrophe." Obviously there was no room for construction as to whether or not this phrase applied to cause or effect. There the insurer by use of the phrase "occurrence or catastrophe" was careful to eliminate any ambiguity. *Hyer v. Inter-Insurance Exchange,* 246 Pac. 1055, a California case, also relied upon by defendant, involved construction of the following phrase: "But in no case shall the Exchange be liable with respect to *claims* *** arising from one accident." (Emphasis supplied). Here, too, any ambiguity in the policy has been clarified by the use of the plural "claims." Neither the Denham case nor the *Hyer* case involved the phrase "aggregate protective" or "aggregate contractual."

Thus here the skilled lawyers who write these policies for insurance companies could easily have obviated the ambiguity that exists in the policy under consideration in the light of the *Anchor* case and inserted in the policy a definition of the phrase "each accident" which would bring it within the rule of *Denham v. LaSalle, supra,* and

Hyer v. Inter-Insurance Exchange, supra. We submit that the failure to do so in the light of the *Anchor case* compels a judgment in favor of the appellant in the case at bar. Interestingly enough, on July 6, 1955, a new standard policy was adopted. Elliott C. Fenton, Esq. discusses the new standard policy in "the Independent Adjuster," Volume 21, No. 3, September, 1956, and points out that the chaotic conditions created by the conflicting decisions of the Fifth Circuit in *Anchor Casualty Company v. McCaleb,* 178 Fed. 2d 322, and *St. Paul Mercury Indemnity Company v. Rutland,* 225 Fed. 2d 689, which we will discuss later, are eliminated in the new policy because the new policy provides:

> "4. Limit of Liability—Coverage B: The limit of property damage liability stated in the declaration as applicable to 'each accident' is the total limit of the company's liability for damages arising out of injury to or destruction of all property of one or more persons or organizations, including the loss of use thereof, as the result of any one accident."

See: 1 Defense Law Journal 368 (1957).

In 1955, after the policy at bar was written, and after the loss at bar, the same problem again came before the Court of Appeals for the Fifth Circuit in *St. Paul Mercury Indemnity Company v. Rutland,* 225 Fed. 2d 689. There the Court in substance, if not specifically, overruled the *Anchor* case, one judge dissenting. We believe that the dissenting Judge in the *St. Paul Mercury Indemnity Company* case correctly defined the rule that should be applied in the case at bar. In any event, this case

did not consider the modifying phrase "aggregate protective." Moreover, events immediately preceding the decision of the majority in the *St. Paul* case are revealing and interesting. The appeal was originally submitted before a panel of judges of the Fifth Circuit consisting of Judges Holmes, Borah and Tuttle. They filed an opinion, one Judge dissenting, sustaining the decision of the District Court which had followed the *Anchor* case, *supra.* Before that opinion became effective, it was withdrawn and the appeal was placed upon a rehearing docket before a new panel of judges consisting of Judges Rives, Cameron and Dawkins. By a divided Court they reversed the decision of the District Court and held in substance that the term "each accident" referred to cause, not effect. Although the majority attempted to distinguish the *Anchor* case, a reading of the majority opinion will reveal that in fact the distinction is without merit as pointed out by Judge Cameron in his dissenting opinion. We urge the Court to study the dissenting opinion of Judge Cameron, and we are convinced that the reasoning he applied should be applied to the case at bar in view of the Montana authorities referred to above.

Moreover, when we consider the number of judges who participated in writing the opinion in *Anchor* and the two opinions in *St. Paul Mercury Indemnity,* the fact is that five judges of the Court of Appeals for the Fifth Circuit have held that the term "each accident" refers to effect, while three judges of that Court have held that the term "each accident" refers to cause. The divergence

of views of the judges emphasizes and reemphasizes the fact that there is an ambiguity which should be resolved in favor of the insured.

In XIX Georgia Bar Journal 377, there is a critical note on the decision of the Fifth Circuit in the *St. Paul Mercury Indemnity Company* case. It is there stated:

> "In the present case, the general standard to the effect that 'ambiguities shall be resolved in favor of the insured' seemed tailor-made for the occasion and would normally have been applied. *Atlas Assurance Co. Ltd. v. Lies,* 70 Ga. App. 162, 27 S.E. 2d 791 (1943). This would have resulted, as it did in the first opinion by the court, in construing the word 'accident' not in a causal sense or as an event, but from the viewpoint of the damage to third persons, which would have made 15 separate accidents. *Anchor Casualty Co. v. McCaleb,* 178 F. 2d 322 (5th Cir. 1949). The court, however, deemed the occasion one for special effort, and after paying lip-service to the general standards, adopted two techniquies which enabled it to construe the word 'accident' as casual only, and to hold against the plaintiff. The first was to give importance to the fiscal consideration of the insurer, and to decide that insurance was sold in exchange for a premium, and that the premium was a rating device that reflected an area of liability; and that no company, at the rate here charged, would assume unlimited liability. Insurance Law Journal No. 384-395, p. 788-790 (1955). The second one was to find that after all there was no ambiguity in the language of the policy and hence the only job of the court was to give to the words employed their 'popular, every day normal meaning.' *Hulsey v. Interstate Life & Acc. Ins. Co.,* 207 Ga. 167, 60 S.E. 2d 353 (1950). Neither of the court's propositions has much to do with the case. The first one displays a tenderness for insurers that seems out of place and seems to overlook completely the fact that plaintiff's construction of the

language, though sufficient to enable recovery here, still contained reasonable limits on liability. The second one may be classed as a sort of subsidiary general standard, but if its use is limited to situations where ambiguities do not exist, it should have no application to the language involved. Moreover, to take a technical word such as 'accident' whose meaning has been the object of legal interpretation for centuries, and attempt to give it a popular meaning, is probably pleasant and rewarding if played as a parlor game, but rather unfortunate if made an ultimate in the judicial process.

"After exploring the two techniques and concluding from them that the insurer's meaning of accident was correct, the court examined available precedents to determine if its decision was 'in line.' *South Staffordshire Tramways Co., Ltd. v. The Sickness & Acc. Assurance Assn., Ltd.,* 1 Q.B. 402 (1891). *Anchor Casualty Co. v. McCaleb,* supra; *Hyer v. Inter-Ins. Exchange,* 246 P. 1055 (C. A. 1926); *Tri State Roofing Co. v. New Amsterdam Casualty Co.,* 139 F. Supp. 193 (W. D. Penn. 1955); *Kuhn's of Brownsville, Inc. v. Bituminous Cas. Co.,* 270 S.W. 2d 358 (Tenn. 1954); *Denham v. LaSalle-Madison Hotel Co.,* 168 F. 2d 576 (7th Cir. 1948). It found of course that there was ample authority for either viewpoint, and hence with stare decisis out of the way, the court decided that its power of choice was unlimited.

"Incidentally, in each of the cases examined by the court, the policy in question contained, in addition to the ambiguous language about property damage, a precise and succinct provision dealing with limitations in liability for personal injuries. This raises the question as to why the insurer should exercise every precaution to be clear and concise in regard to one type of damage, whenever in regard to property caution was abandoned and no effort was made at clarity. The only possible inference from this seems to be that the insurer, who selects the words and writes the policies, was leaving property damage to the way-

ward winds of chance, and when this is done the only reasonable interpretation is one that favors the contention of the plaintiff."

The question before this Court in the case at bar again arose in *Truck Insurance Exchange v. Rohde,* 303 Pac. 2d 659, 41 Wash. 2d 465, 55 A.L.R. 2d 1288. There, by a five to three opinion, the Court held that the term "each accident" referred to cause and not to effect, relying primarily upon the *St. Paul Mercury Indemnity* case. In the annotation that follows that case in 55 A.L.R. 2d at page 1304, there is an effort on the part of the annotator to reconcile the conflicting cases which we have considered. There the annotator states:

"If, on the basis of the present cases, an attempt is made to reconcile the decisions regardless of the rationes decidendi advanced in the respective opinions—simply on the facts presented—such a reconciliation can be achieved on the basis of the closeness of connection in time and space between the individual items of injury or damage. If cause and result are simultaneous or so closely linked in time and space as to be considered by the average person as one event, the courts have invariably found that a single accident within the meaning of the accident clause of the policy has occurred, while if enough time has elapsed between the injuries or damages to the various items involved or if the latter are widely separated in space, the courts have been inclined to allow separate claims even though they sprang from the same cause. Generally speaking, it may therefore be stated that the aggregate of events resulting from insured's negligent act, such as several collisions, constitutes one accident, provided there is a close connection in time and place and a single sequence of cause and effect embracing the entire aggregate of events. If, on the other hand, the times or places and detailed causes of each instance

of injury or damage are different, there are separate accidents although each contains a common causal factor. This test, by necessity, does not suggest a fixed and arbitrary rule of a certain 'permissible' time interval or difference in location. It does not attempt to answer in the abstract how much time must elapse or how far apart the items must be in space before the courts will recognize the existence of separate accidents. All this test can do is to point out the relevant factors which in the past seem to have influenced the courts, at least unconsciously, in reaching their decisions.

"We know at present that a few seconds, which was the interval of time in Truck Ins. Exchange v. Rohde (1956), 49 Wash. 2d 465, 303 P. 2d 659, 55 A.L.R. 2d 1288, is not enough, and we know, on the other hand, *that an interval of several hours,* as was involved in Anchor Casualty Co. v. McCaleb (1949), CA 5th (Tex.) 178 F. 2d 322, and Kuhn's of Brownville, Inc. v. Bituminous Casualty Co. (1954), 197 Tenn. 60, 270 SW 2d 358, is enough. It is easy to imagine situations in which, for instance, several minutes may elapse between the injury or damage to the various persons or properties involved, and which the probabilities are in favor of assuming that the courts will go very far in holding that only one accident occurred, such result is by no means certain. It must not be forgotten that the longer the time interval, the weaker the proximate cause concept and the easier the finding of intervening causes. Substantial physical separation in space of the injured persons or damaged properties seems an even stronger factor in favor of judicial recognition of separate accidents, although there is no case specifically referring to this factor.

"In deciding the issue with which the present annotation is concerned, the courts have to grapple with problems of semantics as well as philosophical concepts. There obviously is no easy way out of a troublesome situation, but it is submitted that the application of the suggested test, while probably not satisfy-

ing those who insist on strict logic, may achieve results which will be regarded as 'just' by more people than any other solution thus far advanced. *It is, of course, obvious that a more precise drafting of the applicable liability policy provisions would go a long way in obviating the problem.*" (Emphasis supplied).

If we apply this effort of reconciliation to the case at bar, then in such event judgment should be entered for the appellant, because the losses in question occurred over a period of time and were not instantaneous as in the cases of *St. Paul Mercury Indemnity Company* and *Truck Insurance Exchange*. Accordingly, we respectfully submit that judgment should be entered in favor of the appellant in this case.

Respectfully submitted,

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